Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BOGUSLAW OCZKOWSKI,

Petitioner

v.

JAMES P. YUDES, P.C.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DID THE NEW JERSEY APPELLATE COURT DENY PETITIONER DUE PROCESS BY AFFIRMING THE TRIAL COURT GRANTING OF SUMMARY JUDGMENT BY IMPROPERLY APPLYING THE LAW TO FACTS?

2. DID THE NEW JERSEY APPELLATE COURT DENY THE PETITIONER CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY UNILATERALLY EXPANDING THE RECORD ON APPEAL?

3. DID THE SUPREME COURT OF NEW JERSEY EXCEED ITS AUTHORITY IN THE ISSUANCE OF RULE 4:46 BY NOT REQUIRING APPLICATION TO ALL PARTIES EQUALLY BEFORE THE COURT?

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OPINIONS BELOW

(a) On April 5, 1994, the Supreme Court of New Jersey denied without written opinion a Petition for Certification to the Appellate Division which is attached hereto as APPENDIX A.

(b) On January 10, 1994, the Appellate Division of New Jersey Superior Court issued an opinion which is attached hereto as APPENDIX B.

JURISDICTION

(a) The date of the judgment which is sought to be reviewed was January 10, 1994. APPENDIX B.

(b) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution

Fourteenth Amendment.

Section 1: No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person its jurisdiction the equal protection of the law.

28 U.S.C. Rule 56

N.J. Rules of Civil Procedure R.4:46

STATEMENT OF THE CASE

This case arises from a New Jersey Appellate Division decision affirming summary judgment dismissing an action against the respondent, entered on January 10, 1994. A subsequent petition to the Appellate Court to reconsider its final decision was denied on February 2, 1994.

On April 5, 1994, the Supreme Court of New Jersey, without opinion, denied a petition for certification.

The case raises a constitutional issue regarding how the law is applied by the state courts in cases involving clients in actions against their former attorneys for damages suffered as a result of said attorneys negligent, unethical, illegal and devious conduct.

Although this case arose from domestic relations matters in the state family court, it is not barred by the domestic

relations exception. The issue before this Court is whether attorneys who engage in conduct against their clients that is harmful, unethical, illegal and unconstitutional to financially enrich themselves should be held accountable? Another issue here is should victims of such acts be afforded due process and equal protection in the state courts when they pursue an action against former lawyers?

The real tragedy a client will face is when the lawyer accused of wrongdoing is a known in the state attorney. In such a case, no matter how severe and obvious the conduct of that lawyer was, it is just not possible to find another attorney willing to take upon representation of the client. Once a client unable to obtain a legal representation attempts to pursue his or her constitutionally guarantied right to court, the court will make new laws and

rules to prevent a client from the right to his day in court as was the case with this petitioner.

This action was commenced by respondent James P. Yudes, P.C. against petitioner Oczkowski for alleged fees due and owing in connection with representation in a matrimonial case. By way of an Answer and Counterclaim, petitioner Oczkowski denied owing any fees, and in fact claimed overpayment for work never performed and alleged that Yudes firm committed legal malpractice and engaged in misconduct and tort against him. Yudes failed to plead or otherwise defend the counterclaim and subsequently had the action for fees due and owing against Oczkowski voluntarily withdrawn.

On July 2, 1990, petitioner obtained a default judgment on the counterclaim. On August 3, 1990, the court entered an order

that permitted the respondent to "file an answer and vacate default". Respondent failed to comply with the court order and never filed an answer and therefore, the default judgment for petitioner Oczkowski stands.

With default judgment standing, the case proceeded through a discovery stage to trial. Neither party moved for a summary judgment or other relief as to the original claims of the counterclaim.

On April 1, 1992, the case came up for a jury trial notwithstanding the fact that respondent Yudes failed to enter pleadings. At the pretrial appearance, the trial judge stated readiness to proceed with trial and gave specific instructions as to how the case would be tried in the presence of a jury. Then, the trial judge requested that Oczkowski would wave his rights to a jury trial which he declined. Respondent's

counsel then requested adjournment of trial for the purpose of filing a motion on two issues; the Statute of Limitation and the Doctrine of Collateral Estoppel. The court granted respondent Yudes his request and the trial was adjourned. The issues at question were however never put before or ruled upon by the trial court. Instead, the court was presented with a motion to dismiss the counterclaim against respondent Yudes on issues not previously disputed or otherwise challenged. Respondent's motion consisted of counsel's statements entirely avoiding issues of material fact and lacked affidavits, relevant case evidence or any part of very extensive discoveries in possession of the respondent. Petitioner opposed the motion to dismiss by way of an affidavit and a substantial amount of evidence consisting of copies of official documents, interrogatories and deposition

transcripts supporting all the claims of the counterclaim.

On June 12, 1992, after the court heard arguments of counsel for respondent and petitioner Oczkowski, pro se, and examined the papers submitted, made no ruling on the motion but gave explicit directives to the parties to submit by a specific date affidavits: For petitioner Oczkowski, to state in detail all causes of action and include all evidence he intended to present at the trial; and for respondent Yudes to answer the allegations by way of an affidavit and include relevant proof. In accordance with the court's directives, petitioner timely submitted his affidavit together with all the supporting evidence, although such disclosure was not mandated by law or rules of court, the petitioner could be potentially deprived of a fair trial. Contrary to the court's directives,

respondent filed no affidavits or any evidential material, but by way of letter directed to the judge mailed well beyond the time limit, "refuted the points raised in the petitioner's affidavit".

On July 2, 1992, the motion was heard and on July 13, 1992, the court entered an order dismissing numerous claims against the respondent. Although the court order identified the claims as being alleged in the petitioner's counterclaim, the specific claims were apparently a result of the court's findings based on the petitioner's arguments, affidavits and the entire evidential file "intended to be presented at the trial" as explicitly requested by the trial judge. In addition, the court dismissed with prejudice petitioner's claims for economic and punitive damages with regard to the counterclaim, although the decision was made on less than all of

claims with the main issue, the legal malpractice, not being dismissed. The order further provided that by July 22, 1992, or in nine (9) days since entry of the order and additional seven (7) days provided for service upon petitioner Oczkowski, he would furnish a "report of an expert who must be an attorney at law of the State of New Jersey with regard to his claim for legal malpractice" or the claim "shall" be dismissed. Claim for intentional infliction of emotional distress was "labeled" by the court as personal injury and to sustain this claim, petitioner had to meet even more stringent requirements set by the court, although, under the state law, medical expert is not required to maintain a claim for intentional infliction of emotional distress. In order for the case not to be entirely dismissed, petitioner had to obtain and submit expert reports

with various conditions placed upon.

Petitioner moved for reconsideration of the July 13, 1992 order claiming that the court's decision was against the weight of the evidence and was not supported by law governing summary judgments. Although the motion was not opposed by the respondent, on August 28, 1992 the court denied relief requested by the petitioner except for reversing itself as to the previously dismissed claim for punitive damages in light of the findings and conclusion made in the report of the legal malpractice expert which was filed with the court on August 24, 1994.

On October 27, 1992, not a scheduled return day for a motion to dismiss filed by the respondent and properly opposed by an affidavit and evidential material of the petitioner, with no arguments presented and

in the absence of the petitioner, the trial court granted respondent summary judgment dismissing petitioner's counterclaim with prejudice. The court's reasoning for dismissal of action was that the expert's report did not establish a proximate cause linking respondent's conduct to Oczkowski's alleged damages.

Petitioner moved for reconsideration of the October 27, 1992 order claiming that the decision of the court was not correct because it was not supported by findings of fact and conclusions of law in the so far factually undisputed action against Yudes. The petitioner's motion was denied and the court concluded that the only remaining claim in the case is one for legal fees which claim was voluntarily dismissed by the respondent on December 16, 1992.

Petitioner sought redress in the New

Jersey Superior Court, Appellate Division, claiming that the decision of the trial court was based on errors in law, lacked findings of fact and prejudicial substantially affecting his rights. That the claims against Yudes were not disputed by way of material fact and the expert legal malpractice report of Milton Diamond, Esq. was based on the same facts, evidence, discoveries the trial court was presented with but ignored to consider. The record on appeal was substantially the same as Mr. Diamond, a well known and highly recognized by New Jersey courts and legal community expert on legal malpractice, used in his preparation of the report under extremely difficult time constraints imposed by the trial court. To assist this Court in more comprehensive presentation of the case, the full report is attached hereto and marked as APPENDIX J.

On appeal, petitioner argued that the court is governed by strict rules and well settled laws governing summary judgment proceedings in New Jersey courts, the requirement which was not applied to the instant case and therefore, the decision of the trial court should be reversed and the case reinstated for a jury trial.

On January 10, 1994, the Appellate Division rendered a decision affirming the trial court's granting of the summary judgment dismissing all claims against the respondent. Petitioner moved for reconsideration on the grounds that the court's decision was in substantial conflict with the record below and was not supported by applicable laws or any legal authority explaining the court's determination. On February 2, 1994, the Appellate Court denied the motion for reconsideration. Petitioner sought redress in the state

court of last resort. On April 5, 1994 the Supreme Court of New Jersey, without a written opinion, denied petitioner Oczkowski a petition for certification. The state courts' opinion will be discussed, infra.

The state courts erroneously applied the laws to the absolutely clear on the face claims. As shown here, petitioner has been dealt a great injustice and suffered irreparable damages.

Now comes petitioner for a writ of certiorari to the Supreme Court of New Jersey directing to reverse and remand the Appellate Court for proper consideration of the claims.

REASONS FOR GRANTING THE WRIT

The Supreme Court rule 10(a) specifies the grounds upon which a writ should be granted. The two which apply here are:

1) 10(a), where the state court of last resort sanctioned a departure by the lower court from accepted and usual course of judicial proceeding and; 2) 10(c), where a state court has decided a federal question in a way that conflicts with the applicable decisions of this Court. Here, the Supreme Court of New Jersey and the state Appellate Court have failed to clarify the ambiguity regarding whether or not the laws governing summary judgments are intended to be inclusive of all parties. This lack of specificity clearly created a judicial environment indicating that Pro Se litigants are excluded from accepted judicial standards, thus, depriving the petitioner Pro Se of his constitutional right to due process and equal protection of the law as provided by the United States Constitution Fourteenth Amendment.

ARGUMENT

1.

DID THE NEW JERSEY APPELLATE COURT DENY PETITIONER DUE PROCESS BY AFFIRMING THE TRIAL COURT GRANTING OF SUMMARY JUDGMENT BY IMPROPERLY APPLYING THE LAW TO FACTS?

This petition raises an issue of constitutional proportion and extreme public importance which has yet to be decided by this Court. If the respondent should succeed on this petition, no client will ever be able to hold his or her attorney liable for negligence and tort resulting from attorney's wrongful conduct. And, should a client pursue an action against his or her former lawyer without representation of another attorney, such a client is likely, if not surely, be denied constitutional right to due process and equal protection of the law.

In this case, the New Jersey Appellate Court made no independent finding of fact or conclusion of law. Rather, the court

adapted the decision of the trial court for apparent public policy reasons. Irrespective of the facts and governing laws and petitioner's right to due process, court's determination was clear that the petitioner should not be permitted to have a trier of fact decide whether the action of the respondent was negligent under the given facts, the facts that were clear and undisputed.

Respondent Yudes failed to perform the duties of an attorney advocate in a divorce action, in fact, an attorney considered to be an "expert" in the family law in the State of New Jersey, and engaged in intentional misconduct against his client, petitioner Oczkowski. This action was commenced by respondent Yudes against petitioner Oczkowski for alleged fees due and owing in connection with representation in appeal of a matrimonial. Perhaps

Yudes suit was an attempted to discourage Oczkowski from an inevitable action he contemplated against the Yudes firm and was seeking an attorney for that purpose?

By way of an Answer and Counterclaim, petitioner Oczkowski denied owing any fees and claimed overpayment for work never performed and alleged that Yudes firm committed legal malpractice and engaged in misconduct and tort against him. Respondent failed to answer or otherwise defend the allegations and the petitioner obtained a default judgment. The trial court had given the respondent a chance to vacate default by filing a late answer which respondent Yudes never filed and therefore, the default judgment stands.

Petitioner retained an expert who have submitted a written report. Respondent did not submit any expert report of his own, nor by way of any material fact deny

negligence in handling of Oczkowski's case or any of the other allegations for tort.

The expert for petitioner concluded in his report that respondent committed legal malpractice and practiced fraud. (J-32) The expert for Oczkowski, Milton Diamond, Esq., repeatedly stated that Yudes failed to exercise the ability, knowledge and skill expected of a New Jersey attorney specializing in matrimonial law; and that he was in all major respects negligent in the performance of the professional duties owed to his client, the petitioner. The expert further stated the seriousness of the conduct on the part of Yudes including; false filing of court documents, charging 65 hours for work never filed, paying Yudes money "as ordered by the court" on fictitious orders, failing to account for some $54,000.00 intended for equitable distribution, and other serious acts as the

"voluminous materials forwarded" and "identified" did indicate. In addition, the report was based on personal interviews with the petitioner. (J-2, 1.1) Contrary to the decisions of the trial court and the Appellate Division opinion which is entirely avoiding reliance on the law, the expert, Mr. Diamond, supported his findings with well settled legal authorities from numerous jurisdictions. See APPENDIX J, pages J-15 to J-29.

The same material the expert used was already on files with the trial court and subsequently made a part of the appellate brief. Other than for factually unsupported personal statements of counsel for the respondent, each and every allegation made against Yudes, either by petitioner Oczkowski or his expert was not disputed to the contrary by way of any material fact.

Thus, there was a genuine issue as to material facts. Rule 4:46 of New Jersey Rules of Court states that summary judgment can be granted when "no genuine issue as to any fact challenged" exists, and states what requirements must be met by a moving party. The Supreme Court of New Jersey made it clear that a role of a judge on a motion for summary judgment is to determine whether there is a genuine issue as to a material fact, but not to define the issue if he finds that one exists. Judson v. Peoples Bank of Westfield, 17 N.J. 67 (1954). And, according to the Appellate Division rulings; A plenary hearing is the place for resolution of disputed facts. Friedman v. Friendly Ice Cream Co., 133 N.J. Super. 333 (App. Div. 1975). And all doubts should be resolved against the movant. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Murner v. First

National Bank of Passaic County, 94 N.J. Super. 293 (App. Div. 1967); Welsh v. Griffith-Prideux, Inc., 60 N.J. Super. 199 (App. Div. 1960).

The State law is very clear that summary judgment should not have been used as a substitute for a trial. In this case of negligence and when the fact issues are so overwhelming, the trier of the facts must make the decision and not the court.

Under Fed. R. Civ. P. Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) Motions must specifically identify the facts asserted to be without genuine

dispute, and the evidentiary materials on the basis of which a party claims that a fact is or is not in genuine dispute must be specifically identified in the motion or response. The court is not required to consider materials not so identified, and is to consider materials only to the extent they would be admissible if the deponent, affiant or person answering the interrogatory were testifying at trial.

At the summary judgment stage, it is not the role of the judge to weigh the evidence or to evaluate its credibility but to determine "whether there is a genuine issue for a trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) There is no issue for trial unless there is sufficient evidence favoring the nonmoving party such that a reasonable jury could return a verdict for that party. Id. The substantive law governing the dispute will determine

which facts are material, and only disputes over "that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, at 248.

Summary judgment principles must initially include consideration of a trilogy of Supreme Court cases: Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). These three opinions stand for the proposition that the moving party bears the burden of showing that the non-moving party cannot sustain the trial burden of proving alleged claims or defenses. The moving party need not affirmatively disprove the alleged case against it, rather, need only show that its adversary has failed to proffer the minimal evidence

necessary to sustain a prima facie case. Once a competent challenge has been made, the non-moving party must show specific evidence which a reasonable jury could rely upon in rendering a verdict favorable to the non-moving party.

Only, if the non-moving party is unable to produce sufficient evidence to support the elements of its prima facie case, then the non-moving party has failed to create a genuine issue of material fact for trial and summary judgment should be granted.

The analogy between this case and the principles set by the U.S. Supreme Court is best stated in Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Plaintiff brought a wrongful death action against various manufacturers of asbestos-containing products, alleging that her husband was exposed to defendants' products. Defendant

Celotex moved for summary judgment asserting that plaintiff had failed to produce evidence showing that Celotex's product proximately caused alleged injuries. While the plaintiff had no witness who could testify about exposure to a Celotex asbestos product, plaintiff produced (1) a transcript of her husband's deposition, (2) a letter from his former employee, and (3) a letter from an insurance carrier to plaintiff's attorney suggesting that her husband was exposed to Celotex's products in Chicago between 1970 and 1971. Celotex countered by arguing that the documents were inadmissible hearsay and did not create a genuine issue of material fact.

The District Court for the District of Columbia granted Celotex's motion because plaintiff did not show that her husband had been exposed to Celotex's product. The

Court of Appeals reversed, holding that Celotex had failed to demonstrate affirmatively that there was an absence of material fact.

The Supreme Court reversed and remanded writing an opinion which is now cited in many motions for summary judgment.

Since the Court of Appeals had initially misplaced the burden of coming forward on Celotex, the Supreme Court remanded for a determination on whether plaintiff's proofs, "if reduced to admissible evidence, would be sufficient to carry (her) burden of proof at trial". Id. at 327. On remand, the Court of Appeals found that plaintiff's evidence was sufficient to overcome summary judgment. Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 40 (D.C. Cir. 1987), cert. denied, 484 U.S. 1066 (1988).

In Anderson v. Liberty Lobby, Inc.,

477 U.S. 242 (1986), the Supreme Court addressed the non-moving party's burden of production in defending a motion for summary judgment. Anderson involved a libel suit brought by a lobbying organization. The District Court granted defendant's summary judgment in the absence of clear and convincing evidence of the actual malice element required in defamation cases. The Court of Appeals substituted a preponderance of evidence standard and reversed the lower court decision. The Supreme Court reversed and remanded the matter for further findings and proceedings.

For example, there is no genuine issue if the evidence presented is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence. 477 U.S. 254. See Lombardi, The Greening

of Summary Judgment, 21 THE BRIEF 41, 42 (Fall 1991).

In addition, the Court confirmed that the Rule 56(c) "genuine issue of material fact" language in this that the alleged factual dispute must involve a material fact, with materiality to be determined by an analysis of substantive law. Id. at 248. And, that trial judges should avoid personally weighing the evidence. Id. at 266.

The third case in the Supreme Court's trilogy is Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). This case also involved the burden of production of the non-moving party in defending a summary judgment motion. In this case, the Court emphasized that once the respective parties have submitted their proofs either for or against summary judgment, the trial court must evaluate the evidence. Under either approach, the moving

party must realize that every effort should be made to support summary judgment motions with as much evidence as is available and, if possible, to negate the non-moving party's claims.

Importantce about Matsushita case and this one is that although respondent Yudes was in possession of a "wealth" of evidence including; eleven (11) hours of non-stop depositions of petitioner Oczkowski, hundreds of interrogatory answers, and, if indeed Yudes did any work at all for $7,000 paid to represent the petitioner and claiming additional $6,799.10 due, there should be a substantial record for the work performed. See Appellate Division opinion, (B-2 to B-4) However, there was no evidence whatsoever produced by respondent Yudes disputing the claims of the Counterclaim; (APPENDIX H) contradicting any part of the expert report; (APPENDIX J) or anything in

support of the summary judgments of the trial court; (APPENDIX D, E & F) nor to factually support the findings of the Appellate Court opinion; (APPENDIX B)

On the other hand, petitioner Oczkowski was compelled by the trial court to submit, and did so, the entire trial evidence, the court chose to ignore or wanted to avoid.

This case is in a serious conflict with any of the decisions of the New Jersey courts, the U.S. Supreme Court and the various courts around the United States concerning summary judgments motions. There are at least two issues demanding this Court's intervention:

1) What were the legal standards, rules, statutes, regulations, laws were applied to petitioner Oczkowski, first by the trial court and then the Appellate Division affirming the court's summary judgment. There may be no clear answer to

this question.

2) The United States Constitution, 14th Amendment "due process" and "equal protection of the law" provisions, equally and unconditionally apply to all citizens of the United States. No one is or should be above the law, including attorneys. Nor, should the clients be denied the equal protection of the law.

It is clear that this petitioner was denied his 14th Amendment Rights, which this Court should restore without any reservations.

2.

DID THE NEW JERSEY APPELLATE COURT DENY THE PETITIONER CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY UNILATERALLY EXPANDING THE RECORD ON APPEAL?

What makes this case substantially different from the accepted judicial process is that the Appellate Division

considered evidential material which was not a part of the record below. The Supreme Court of New Jersey said in County of Bergen v. Borough of Parade, 79 N.J. 302, 309 (1979) that consideration of documents not offered into evidence is "a clear violation of R. 2:5-4 (Rule adopted by the Supreme Court governing the courts in New Jersey) and the Appellate Division should not consider evidential material not contained in the record"; Cherry Hill Dodge, Inc. v. Chrysler Credit Corp., 194 N.J. 191, 204 (App.Div. 1977) cert. den. 75 N.J. 538 (1977) (considering evidential material not present below "could destroy the essence of the appellate process") Thus, by not applying this law to the petitioner, he was denied his right to due process and equal protection of the law.

It is undisputed that the Appellate Division relied heavily on materials not

submitted into evidence below as evident in the opinion which is to be reviewed by this Court. See APPENDIX B

Here, it could be said that nearly the entire opinion of the Appellate Court, completely or substantially, is in conflict with the case record. It is not this petitioner's intention to question what record the Appellate Court relied upon, where it came from or why the extensive record on appeal was not properly considered. It is however petitioner's Oczkowski contention to point to this Court the issues that were not correct in the opinion and resulted in denial of justice.

With regard to relevant issues of the Appellate Division opinion contradicting the case record, this Court is requested to note the following as will be pointed out in a sequential order:

(a) Nothing in record indicated that

respondent Yudes "successfully moved for removal of levy which [petitioner's] wife placed on his bank account to satisfy a court order.....for wife's attorney's fees..." There was no trace of a signed court order or filed with court papers by Yudes papers supporting Appellate Division finding. (B-2 l.12, see also, J-6 l.4 to J-8 l.10)

(b) There was no evidential record before the court indicating what or to what extent "[respondent] continued representation of [petitioner] in the appeal.." (B-2, l.17)

(c) There was no evidential record indicating that respondent "unsuccessfully attempted to obtain payment of the remaining balance from [petitioner]" to continue appeal, but correctly stated that "eleven days before brief was due in the Appellate Division, [Yudes] would no longer

represent [Oczkowski]". Extensive record presented to the court by petitioner, including personal writings and recorded telephone statement of respondent Yudes himself, indicated that surrender of the family home or a mortgage was the only form of payment respondent Yudes demanded from the petitioner to continue appellate work. (B-3, 1.1; J-14, 1.8 and J-25, 1.17)

(d) There was absolutely nothing in record before the Appellate Division indicating or even remotely suggesting that "[respondent] pro se, completed the brief begun by [respondent Yudes]....." Petitioner was grossly deprived of a meaningful appeal by being refused by the respondent to return his files required for his pro se appellate brief. (B-3, 1.8; see also D-2, 1.1, J-26, 1.5 and H-4 to H-7)

(e) The opinion failed to point to a single evidence in record justifying "legal

fees in the amount of $6,799.10 incurred in representing [petitioner] on his appeal". (B-5, 1.2)

(f) At no time "[respondent Oczkowski] claimed that he lost approximately $100,000 because of the levy placed upon his bank account.....". This finding of the Appellate Division is not only most incorrect, it is not even logical in light of the evidence presented that was crystal clear confirming such a loss to the petitioner, in part, due to not accounting by the respondent for some $54,000, and other evidence included in the record. (B-4, 1.16; also see J-31, 1.11 & H-4- H-7)

(g) The Appellate Division properly noted that on July 2, 1990 default judgment was obtained against the respondent, and that on August 3, 1990 default was vacated. The court failed to recognize the fact that the court imposed provision to vacate

default was contingent upon filing an answer to the counterclaim. Since this provision of the court order was never met, default judgment against respondent Yudes stands. (B-5, 1.8 and APPENDIX I)

(h) As to the balance of the Appellate Division opinion, (B-6 to B-10) other issues contradicting the record include: Additional time to obtain an expert report was a result of a personal request of the expert, Mr. Milton Diamond, to the judge and not a formal request of the petitioner. (B-6, 1.9); No transcript of the hearing for reconsideration on August 28, 1992 was before the Appellate Division or accepted to be consider by the court, therefore, citing the trial judge was not proper nor could be confirmed by the record. (B-6, 1.10), nor, was the granting of extension of time for the filing of legal end medical expert reports at issue. (B-7, 1.1 and

1.16); And, with respect to the issue of proofs the court said "that defendant (Oczkowski) failed to provide 'any proofs at all' supporting a cause of action", resulting in denial of reconsideration of the July 13 order". Although, the court attempted to cite portions of the August 28, 1992 hearing, not in record, it failed to acknowledge the fact that some 300 pages of affidavits, pleadings, interrogatories, depositions, documents, expert reports and other proofs were submitted to the trial court and all included in the petitioner's appendix of the appellate brief. (B-7, 1.7)

The record is clear that the Appellate Division opinion was not intended to find if a question of material fact existed supporting entry of the summary judgment. This in conjunction with the fact that the court showed no reliance on a single legal authority was clearly not in line with the

accepted way of administration and serving justice. Thus, petitioner Oczkowski was denied his constitutional rights to a meaningful appeal, due process and equal protection of the law.

3.

DID THE SUPREME COURT OF NEW JERSEY EXCEED ITS AUTHORITY IN THE ISSUANCE OF RULE 4:6 BY NOT REQUIRING APPLICATION TO ALL PARTIES EQUALLY BEFORE THE COURT?

Article VI, Section II, paragraph 3 of the New Jersey Constitution of 1947 charges the Supreme Court of New Jersey with the responsibility for making rules governing the practice and procedure in and the administration of all of the courts in the State. In the exercise of this obligation comprehensive rules were promulgated effective September 15, 1948.

The Supreme Court of New Jersey adapted Rule 2:5-4(a) of the Rules of Court states

that "the record on appeal shall consist of all papers on file in the court below". Consideration of any material not offered into evidence in the lower court is a violation of the Rule and it specifically applies to the Appellate Court. Here, the Appellate Division issued an opinion based on findings that were in conflict with the record below. In fact, substantial part of the opinion could not be factual at all.

Rule 4:46-2 of the N.J. Rules of Court, governing summary judgment motions states that summary judgment can only be granted when "no genuine issue as to any material fact challenged" exists.

The Supreme Court of New Jersey summarily affirmed without opinion the Appellate Division decision which conflicts with the acceptable judicial process the State Supreme Court is constitutionally mandated to make and enforce.

The first cardinal rule of jurisprudence is that in every suit each party shall be accorded due process, and if procedural rules are not followed and right of due process is denied, final decision of court must, on appeal, be reversed. Citing Gorin v. McFarland, 224 N.E. 2d 615, 80 Ill App. 2d 398, appeal after remand 247 N.E. 2d 680, Ill App 2d 348.

This petitioner's was denied elementary procedural due process, and the State Supreme Court took a position that the rules it made need not be applied (or enforced) to all parties equally.

This Court is requested to resolve this conflict over this important constitutional issue.

CONCLUSION

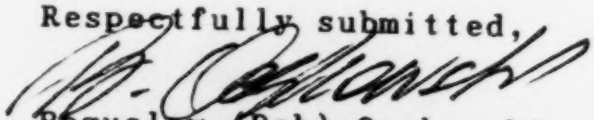
The Supreme Court of New Jersey had failed to give this case the thorough

consideration it deserves. Its summary affirmance of the State Appellate Court's clearly erroneous opinion decided federal questions that conflict with this Court's precedent regarding the applicable standards for summary judgment motions.

The N. J. Supreme Court has departed from accepted and usual course of judicial proceedings and sanctions such as departure by lower court as to call for an exercise of its own and this Court's power of supervision.

Petitioner suffered damages of extreme proportion and this Honorable Court should grant this writ and reverse and remand to the Supreme Court of New Jersey with instructions to remand this case to a trial court for reinstatement and jury trial.

Respectfully submitted,



Boguslaw (Bob) Oczkowski
Petitioner Pro Se

August 2, 1994

APPENDIX A

SUPREME COURT OF NEW JERSEY

C-781 September Term 1993
38,189

ON PETITION FOR CERTIFICATION

JAMES P. YUDES, P.C.,
Plaintiff-Respondent,

v.

BOGUSLAW OCZKOWSKI,
Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgement in A-2021-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice at Trenton, this 5th day of April, 1994.

CLERK OF THE SUPREME COURT

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2021-92T3

JAMES P. YUDES, P.C.,

Plaintiff-Respondent,

vs.

BOGUSLAW OCZKOWSKI,

Defendant-Appellant.

Submitted December 13, 1993
Decided January 10, 1994

Before Judges Baime, Conley and Villanueva

On appeal from Superior Court of New Jersey, Law Division, Union County.

Boguslaw (Bob) Oczkowski, appellant, submitted a pro se brief.

O'Donnell, Kennedy, Vespole, Piechta & Trifiolis, attorneys for respondent (John C. Kennedy, of counsel and on the brief).

PER CURIAM

Defendant appeals from the summary judgment dismissing his counterclaim alleging legal malpractice and the denial

of his motion for reconsideration. We affirm.

After a Final Judgment of Divorce was entered in 1987, defendant appealed with respect to visitation and equitable distribution issues. On appeal, defendant was represented by two other attorneys before he hired plaintiff.

Upon hiring plaintiff law firm in September 1987, defendant paid a $5,000 retainer. Shortly thereafter, plaintiff, on behalf of defendant, successfully moved for the removal of a levy which defendant's wife had placed on his bank accounts to satisfy a court order requiring that defendant pay his wife's attorney fees plus interest. Plaintiff continued representation of the defendant in the appeal and periodically sent bills to the defendant for work performed but defendant failed to pay. On December 18, 1987, defendant paid

plaintiff another $2,000. After unsuccessfully attempting to obtain payment of the remaining balance from defendant, plaintiff informed defendant on February 9, 1988, eleven days before the brief was due in the Appellate Division, that plaintiff would no longer represent defendant.

Defendant, pro se, completed the brief begun by plaintiff and filed his own reply brief. On appeal, we held that the custody and visitation arrangements which the trial court had entered with the judgment of divorce were proper but remanded the case for consideration of the equitable distribution of personal injury settlement proceeds received by defendant during the marriage. On remand, the trial court determined that the proceeds were not subject to equitable distribution. That decision was later affirmed.

April 19, 1990, plaintiff filed a

complaint against defendant seeking payment of legal fees in the amount of $6,799.10 allegedly incurred in representing defendant on his appeal. The defendant filed an answer and a counterclaim for malpractice and for damages pursuant to the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. Defendant alleged that plaintiff overcharged him for the work performed and improperly charged for work that was never performed. Defendant also alleged that plaintiff failed to use reasonable care in representing defendant during the appeal and improperly ceased representation, causing emotional distress and financial loss. Defendant also claimed that he lost approximately $100,000 because of the levy placed on his bank account and the inadequate representation with regard to that levy. Additionally, defendant charged that plaintiff made excessive and unnecessary

telephone calls to defendant's place of business and frequently required that defendant leave work, disrupting his work unnecessarily and causing defendant to lose his job. Finally, defendant claimed that he suffered emotional distress as a result of plaintiff's conduct.

On July 2, 1990, defendant obtained a default judgment on the counterclaim but the default was vacated August 3, 1990. On April 24, 1992, plaintiff filed a motion to dismiss defendant's counterclaim because it was not supported by an expert opinion, did not establish a cause of action for emotional distress and was barred by the statute of limitations, the entire controversy doctrine and the doctrine of collateral estoppel. After oral argument, Judge Menza by order dated July 13, 1992, dismissed all defendant's claims except the malpractice claim and ordered defendant to

submit an expert report by July 22, 1992, or that claim would also be dismissed. Additionally, the court required expert reports from defendant, by the same date, to support the emotional distress claims. Later, defendant was given until August 22 to furnish the reports. Defendant filed a motion for reconsideration of the July 13 Order and later requested additional time to obtain an expert report. At the hearing on August 28, 1992, defendant explained the wrongs done to him which had already been explored at the July 13 hearing. The court interrupted and requested that defendant "address these issues succinctly." The court further admonished defendant for speaking "in glittering generalities" and refusing to "get specific." Defendant continued to claim that plaintiff committed fraud and caused defendant duress by overbilling and billing for unperformed

services.

After lengthy argument and colloquy, the court concluded by granting an extension for the filing of legal and medical expert reports. The court refused to not reconsider the dismissal of defendant-counterclaimant's claims, however, noting that "[t]his case is precisely the situation that the summary judgment procedure is intended to address" and that defendant failed to provide "any proof at all" supporting a cause of action. On September 23, 1992, Judge Menza formally denied defendant's motion for reconsideration of the July 13 Order.

On August 21, 1992, defendant finally submitted the expert report of Milton Diamond, Esquire. Diamond opined that plaintiff was negligent in excessively calling defendant at his place of business and in abandoning defendant's appeal.

Diamond also found that plaintiff overcharged defendant. Diamond stated that he was relying on defendant's assertions and that, assuming the truth of those allegations, plaintiff committed malpractice. On October 9, 1992, plaintiff again moved to dismiss defendant's counterclaim, claiming that the expert report did not establish proximate cause linking the plaintiff's conduct to defendant's alleged damages. Plaintiff also asserted that defendant again failed to produce any proof of damages and failed to show how the levy was at all related to the malpractice. Finally, plaintiff claimed that the defendant's counterclaim for overcharging, and charging for work not performed, was not the proper basis for a counterclaim but rather for a defense to plaintiff's claims against defendant for unpaid fees. October 27, 1992, Judge Menza rendered an oral

opinion granting plaintiff summary judgment dismissing defendant's counterclaim. On November 4, 1992, defendant moved for reconsideration. On November 13, 1992, Judge Menza heard oral argument but denied the motion. The court concluded that the counterclaim was properly dismissed and the plaintiff's claim for legal fees was the only claim remaining in the case. The order was entered November 16, 1992.

On December 28, 1992, an order of voluntary dismissal without prejudice was entered stipulating that plaintiff's complaint would be dismissed without prejudice and would be converted to a dismissal with prejudice ("[u]pon a full and final disposition of any and all claims of the defendant against the plaintiff..... .If, however, any claims of the defendant against the plaintiff are reinstated or brought back before the Court.....the

plaintiff's Complaint herein shall be automatically reinstated....." Defendant appeals from the November 16 Order which denied defendant's motion to vacate the October 27 Order. Affirmed substantially for the reasons given by Judge Menza on October 27, 1992 and November 13, 1992.

CLARK, APPELLATE DIVISION

APPENDIX C

ORDER OF MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2021-92T3
MOTION NO. M-2890-93
BEFORE PART: C
JUDGE(S): BAIME
CONLEY
VILLANUEVA

JAMES P. YUDES, P.C.

vs.

BOGUSLAW OCZKOWSKI

MOTION FILED: JANUARY 20, 1994 BY: BOGUSLAW OCZKOWSKI

ANSWER(S) FILED: BY:

SUBMITTED TO COURT: JANUARY 26, 1994

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT. IT IS ON THIS 2ND DAY OF FEBRUARY, 1994, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT BOGUSLAW OCZKOWSKI FOR RECONSIDERATION

GRATED	DENIED	OTHER
[ ]	[X]	[ ]

FOR THE COURT:

/s/DAVID S. BAIME J.A.D.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. UNN-L-3071-90

JAMES P. YUDES, P.C.
Plaintiff

-vs-

CIVIL ACTION

ORDER

BOGUSLAW OCZKOWSKI,
Defendant

This matter having been opened to the Court by Frederick W. Stevens, attorney for counterclaim defendant James P. Yudes, upon Notice of Motion to dismiss the Counterclaim of the defendant Boguslaw Oczkowski and the Court having heard argument with regard to the Motion on June 12, 1992 and on July 2, 1992 and for the reasons expressed orally on the record by the Court and for good cause shown,

It is on this 13th day of July, 1992;

ORDERED that the defendant's Counterclaim in that it asserts claims for intentional infliction of emotional

distress, fraud, duress, interference with person and property, interference with an employment relation, interference with and obstruction of justice and perpetration of a fraud upon the Court, conspiracy to deprive defendant of liberty and property, refusal to return property, refusal to account for services rendered, refusal to account for money paid and violations of the New Jersey Consumer Fraud Act be and same hereby are dismissed with prejudice, and it is

FURTHER ORDERED that with regard to the Counterclaim defendant's claims for economic damages that same are hereby dismissed with prejudice, and it is

FURTHER ORDERED that the counterclaimant's claim for punitive damages be and same hereby is dismissed, and it is

FURTHER ORDERED that the defendant-counterclaim shall by July 22, 1992

furnish the report of an expert who must be an attorney at law of the State of New Jersey with regard to his claim for legal malpractice or, in the event that such report is not furnished, the claim for legal malpractice shall be dismissed, and it is

FURTHER ORDERED that the defendant-counterclaimant shall name an expert to testify as to his claim of personal injury including psychological injury and he shall provide a summary of the testimony of said expert which shall specifically causally relate any medical conditions of the counterclaim to specific actions by the plaintiff, by July 22, 1992, and it is

FURTHER ORDERED that in the event that said medical expert is so named, that his report providing the basis for his opinion shall be furnished within twenty days thereafter, and it is

FURTHER ORDERED that the Court's determination of the issue of the bar of the Statute of Limitations with regard to any personal injury claim of the defendant-counterclaimant shall take place in the event said medical expert report is furnished, and it is

FURTHER ORDERED that a true copy of this Order shall be served upon all parties and counsel within seven (7) days from the date.

/s/ ALEXANDER MENZA, J.S.C

PAPERS CONSIDERED:

Notice of Motion

Movant's Affidavit(s)

Movant,s Brief

Answering Affidavit(s)

Answering Brief

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. UNN-L-3071-90

JAMES P. YUDES, P.C.
Plaintiff

vs.

CIVIL ACTION

BOGUSLAW OCZKOWSKI
Defendant

ORDER DISMISSING
DEFENDANT'S COUNTERCLAIM
WITH PREJUDICE

THIS MATTER being opened to the Court by Frederick W. Stevens, Esq. on behalf of the Counterclaimant/Defendant, James P. Yudes, upon Notice of Motion to dismiss the Defendant's counterclaim, and the Court having examined the Brief submitted in support therefore, having heard oral argument and for good cause shown;

IT IS on this 27th day of October, 1992

ORDERED that the defendant's Counterclaim be and same hereby is dismissed with prejudice; and it is

FURTHER ORDERED that a true copy of this Order be served upon all parties within seven (7) days of the date hereof.

/s/Alexander J. Menza, J.S.C.

APPENDIX F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. UNN-L-3071-90

JAMES P. YUDES, P.C.
Plaintiff

vs. CIVIL ACTION

BOGUSLAW OCZKOWSKI
Defendant

ORDER DENYING DEFENDANT'S THE MOTION TO VACATE THE PREVIOUS ORDER OF THIS COURT DATED OCTOBER 27, 1992 DISMISSING THE DEFENDANT'S COUNTERCLAIM

This matter having been opened to the Court by Boguslaw Oczkowski, defendant-counterclaimant pro se, upon Notice of Motion filed on short notice for a reconsideration of the Order of the Hon. Alexander J. Menza, J.S.C., dated October 27, 1992 dismissing the defendant's counterclaim with prejudice and the Court having examined the moving papers submitted in support thereof and the papers submitted in opposition thereto, having heard oral

argument and being satisfied that the previous Order entered by this Court was legally supported by facts and law and for good cause shown,

It is on this 16th day of November 1992;

ORDERED that the defendant's Motion to vacate and void the previous Order of the Court dated October 27, 1992 be and same hereby is denied in all respect, and it is;

FURTHER ORDERED that a copy of this Order shall be served upon all counsel within seven (7) days from the date hereof.

/s/ Alexander Menza, J.S.C.

PAPERS CONSIDERED:

___ Notice of Motion
___ Movant's Affidavit(s)
___ Movant's Brief
___ Answering Affidavit(s)
___ Answering Brief
___ Cross-Motion
___ Movant's Reply
___ Other

APPENDIX G

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY

JAMES P. YUDES, P.C.
Plaintiff

VS.

CIVIL ACTION

BOGUSLAW OCZKOWSKI
Defendant

COMPLAINT (ON CONTRACT)

Plaintiff, James P. Yudes, Professional Corporation, with law offices located at 80 Morris Avenue, Township of Springfield, County of Union, and State of New Jersey, by way of Complaint against the defendant, says:

FIRST COUNT

1. At all times relevant hereto, the plaintiff is a Corporation of the State of New Jersey, engaged in the practice of law.

2. The defendant's last known place of residence was 3 Easton Avenue, Spotswood, New Jersey.

3. The plaintiff was retained by the

defendant to perform certain legal services on behalf of the defendant, in connection with the matrimonial action, Oczkowski v. Oczkowski, and a written Retainer Agreement was entered into. A copy of the Retainer Agreement between the plaintiff and the defendant is attached hereto as EXHIBIT "A" and is made a part of the Complaint.

4. The plaintiff represented the defendant throughout various proceedings in connection with the matrimonial matter of Oczkowski v. Oczkowski, Chancery Division, Family Part, Middlesex County, as aforesaid, and performed all necessary legal services attendant thereto.

5. There is presently due and owing to the plaintiff from the defendant for legal services performed in connection with the aforementioned representation, the sum of $6,799.10, including costs, disbursements and other expenses related thereto.

Copies of all invoices are attached hereto and made a part hereof as EXHIBIT "B". Plaintiff has demanded payment of said fees, and the defendant has failed and refused to pay the same.

6. The defendant has breached his contract with the plaintiff obligating him to pay for legal services upon receipt of periodic billing statements. He has received an invoice indicating $6,799.10 to be due and owing and has failed and refused to honor same on a request to do so.

7. The defendant has been notified on diverse and several occasions of his outstanding indebtedness, pursuant to N.J.S.A. 2A:13-6, but has refused and still refuses to pay said debt and obligation. Additionnally, the defendant was notified of his option to pursue fee arbitration pursuant to R.1:20A-6. Attached hereto as EXHIBIT "C" and made a part hereof is a copy of a

letter, dated March 12, 1990, which was sent to the defendant, certified mail, return receipt requested and by ordinary mail.

WHEREFORE, the plaintiff demands judgment against the defendant, in the amount of $6,799.10, together with interest and costs of suit.

SECOND COUNT

1. Plaintiff repeats and reiterates each and every allegation of the First Count as if more fully set forth herein at length.

2. The plaintiff represented the defendant throughout various proceedings in connection with the matrimonial matter of Oczkowski v. Oczkowski, Chancery Division, Family Part, Middlesex County, as aforesaid, and performed all necessary legal services attendant thereto.

3. As a result of the defendant's

failure and refusal to pay plaintiff's bill for legal services rendered on behalf of the defendant as aforesaid, the defendant has been unjustly enriched.

4. The defendant has been notified on diverse and several occasions of his outstanding indebtedness pursuant to N.J.S.A. 2A:13-6, but has refused and still refuses to pay said debt and obligation. Additionally, the defendant was notified of his option to pursue fee arbitration pursuant to R.1:20A-6. Attached hereto as EXHIBIT "C" and made a part hereof is a copy of a letter dated March 12, 1990, which was sent to the defendant, certified mail, return receipt requested and regular mail.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of $6,799.10, together with interest and costs of suit.

THIRD COUNT

1. Plaintiff repeats and reiterates each and every allegation of the First and Second Counts as if more fully set forth herein at length.

2. Plaintiff is entitled to the reasonable value for services rendered on behalf of the defendant in the amount of $6,799.10.

3. The defendant has failed and refused to pay plaintiff for the reasonable value of said services although requested to do so.

4. The defendant has been notified on diverse and several occasions of his outstanding indebtedness pursuant to N.J.S.A. 2A:13-6, but has refused and still refuses to pay said debt and obligation. Additionally, the defendant was notified of his option to pursue fee arbitration pursuant to R.1:20A-6.

Attached hereto as EXHIBIT "C" and made a part hereof is a copy of a letter dated March 12, 1990, which was sent to the defendant, certified mail, return receipt requested and ordinary mail.

WHEREFORE, the plaintiff demands Judgment against the defendant, in the amount of $6,799.10, together with interest and cost of suit.

FOURTH COUNT

1. Plaintiff repeats and reiterates each and every allegation of the First, Second and Third Counts as if more fully set forth herein at length.

2. There is due from the defendant the sum of $6,799.10, on a certain book account, a true copy of which is attached hereto.

3. Payment has been demanded and has not been made.

4. The defendant has been notified on

diverse and several occasions of his outstanding indebtedness pursuant to N.J.S.A. 2A:13-6, but has refused and still refuses to pay said debt and obligation. Additionally, the defendant was notified of his option to pursue fee arbitration pursuant to R.1:20A-6. Attached hereto as EXHIBIT "C" and made a part hereof is a copy of a letter dated March 12, 1990, which was sent to the defendant, certified mail, return receipt requested and ordinary mail.

WHEREFORE, the plaintiff demands Judgment against the defendant, in the amount of $6,799.10, together with interest and cost of suit.

JAMES P. YUDES, P.C.
Attorneys for Plaintiff

/s/ Kevin M. Mazza
For the Firm

Dated: April 17, 1990

APPENDIX H

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY

JAMES P. YUDES, P.C.
Plaintiff

vs.

Docket No.
UNN-L-03071-90

BOGUSLAW OCZKOWSKI,
Defendant

CIVIL ACTION

ANSWER, SEPARATE DEFENSES,
COUNTERCLAIM, JURY DEMAND
AND CERTIFICATE OF DEFENDANT

The defendant, Boguslaw Oczkowski, residing at 3 Easton Avenue, Spotswood, New Jersey, by way of answer to the complaint of the plaintiff says that:

ANSWER TO FIRST COUNT

1. Defendant admits to allegations of Paragraph 1, 2, 3 and 7 of the First Count.

2. Defendant denies allegations of Paragraph 4 of the First Count.

3. Defendant denies allegations of Paragraph 5 of the First Count.

4. Defendant denies allegations of

Paragraph 6 of the First Count.

ANSWER TO SECOND COUNT

1. Defendant denies allegations of Paragraph 2 and 3 of the Second Count.

2. Defendant admits to allegations of Paragraph 4 of the Second Count.

ANSWER TO THIRD COUNT

1. Defendant denies allegations of Paragraph 2 and 3 of the Third Count.

2. Defendant admits allegations of Paragraph 4 of the Third Count in that respect that he was only once notified about outstanding indebtedness but denies all allegations that he refused and still refuses to pay said debt and obligations.

ANSWER TO FOURTH COUNT

1. Defendant denies allegations of Paragraph 2 of the Fourth Count.

2. Defendant admits to Paragraph 3 and 4 of the Fourth Count.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

The Complaint fails to state a claim and is not supported by true and/or complete statements and Exhibits as provided by the plaintiff upon which relief can be granted.

SECOND SEPARATE DEFENSE

Negligence, if any, on the part of the defendant was not the cause of any injuries which may have been sustained by the plaintiff.

THIRD SEPARATE DEFENSE

The plaintiff, James P. Yudes, P.C., knowingly and willfully concealed, suppressed, misrepresented or deceptively presented the cause upon which relief could be granted since the Complaint is not supported by good faith facts stating the nature of services rendered, fees received and other factors pertinent to the itemization and disbursement for which reimbursement is

sought, and any other factors relevant in evaluating such fees and costs as demanded.

FOURTH SEPARATE DEFENSE

No liability can be imposed upon this defendant because the plaintiff's Complaint was frivolously commenced and supported by bad faith facts for the sole purpose of harassment or malicious injury.

FIFTH SEPARATE DEFENSE

Damages, if any, sustained by the plaintiff were the result of the actions of third parties over whom this defendant exercised no control.

SIXTH SEPARATE DEFENSE

Damages, if any, were the result of the sole negligence of the plaintiff.

COUNTERCLAIM

1. On September 28, 1987, the defendant retained and paid the plaintiff $5,000.00 and subsequently $2,000.00 to perform certain legal services in connection with

his divorce action.

2. At all times, as aforesaid, the plaintiff did not utilize reasonable care and prudence nor exercised knowledge, skill, ability and devotion c·dinarily possessed and employed by members of the legal profession in performing legal services and responsibilities in connection with the representation of the defendant, in violation of the Rules of Professional Conduct.

3. Plaintiff demanded and was paid by the defendant, in full or in excess, for services that were rendered him, and those that were fictitious or obtained by deceptive frauds, false pretenses, false promises, misrepresentation or other unconscionable professional and commercial practices, in violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et.seq.

4. In further pursuance of his fraud-

ulent scheme to harm, injure, or cause emotional, physical and financial damage to the defendant, the plaintiff willfully, knowingly, intentionally and falsely acted or engaged in the following:

a) Ceased to represent the defendant because he refused to surrender a mortgage on his house for services never performed, falsely performed, or to be performed by the plaintiff in connection with the work he was retained to do.

b) Refused and continue to refuse to return the defendant's original files given to the plaintiff or obtained on his own that did not come as a result of plaintiff's representation of the defendant.

c) Refused and continue to refuse to account to the defendant for all work done in connection with plaintiff's representation of the defendant.

d) Refused and continue to refuse to

account for all monies received from the defendant for alleged services rendered in connection with plaintiff's representation of the defendant.

e) Refused and continue to refuse to account for other monies demanded and paid to the plaintiff by the defendant and not for alleged representation of him but for other purposes known to the plaintiff but deliberately concealed, suppressed from the defendant or falsely presented to him.

5. As a direct and proximate result and consequence of the use of employment by the plaintiff, James P. Yudes, A Professional Corporation, of the above methods, acts and practices, defendant, Boguslaw Oczkowski, did rely upon those actions of the plaintiff, and did suffer loss of money, property and other general damages, past and future.

WHEREFORE. the defendant-counterclaim-

ant, Boguslaw Oczkowski, demands Judgment in whole or in part, against the plaintiff, James P. Yudes, A Professional Corporation for:

A. Compensatory Damages;

B. Punitive Damages;

C. Interest;

D. Cost of Suit;

E. Attorneys Fees, if any;

F. Special Damages;

G. Consequential Damages;

H. Damages for emotional distress and mental anguish;

I. Any other relief the Court may deem equitable and just.

Dated: May 24, 1990

By:
Boguslaw Oczkowski, Pro Se
Defendant-Counterclaimant

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all issues now and hereafter involved in the above cause.

CERTIFICATION

It is hereby certified that this matter is or will be, in full or in part, subject to presently pending action in Superior Court of New Jersey, Middlesex County, Law Division, entered under Docket No. L-13119-89, and the plaintiff. James P. Yudes, A Professional Corporation, is or will be named under one or more fictitious names shown as JOHN DOE. JANE DOE or ABC CORPORATION, and that no other action or arbitration proceeding than named above is contemplated.

Dated: May 24, 1990

/s/Boguslaw Oczkowski, Pro Se

Defendant-Counterclaimant

APPENDIX I

"Default has been entered as to this filed request....Filed Jul. 02, 1990. Walter G. Halpin - County Clerk"

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY

JAMES P. YUDES, P.C.
Plaintiff

vs.

Docket No.:
UNN-L-03071-90

BOGUSLAW OCZKOWSKI,
Defendant

CIVIL ACTION

REQUEST TO ENTER
DEFAULT AND CERTIFICATION

TO: CLERK OF THE SUPERIOR COURT
UNION COUNTY - LAW DIVISION
2 Broad Street
Elizabeth, New Jersey 07201

You will please enter the Default of the Plaintiff for failure to plead or otherwise defend the Defendant's Counterclaim as provided by the Rules of the Court.

Dated: June 28, 1990

Boguslaw Oczkowski
Defendant-Counterclaimant

APPENDIX J

Law Office
MILTON DIAMOND
One Kettle Creek Road
Freehold Township, N.J. 07728

August 21, 1992

Mr. Boguslaw Oczkowski
3 Easton Avenue
Spotswood, NJ 08884

Re: Yudes v. Oczkowski
Docket No. UNN-L-3071-90

Dear Mr. Oczkowski:

This report relates to a counterclaim for legal malpractice brought by you against your former attorneys, James P. Yudes, P.C., members of the New Jersey Bar. It derives from your request for my opinion as to whether Yudes breached any duty to you when he undertook to represent your interests in connection with divorce proceedings then pending between you and your former wife.

For purposes of this report, I have read, analyzed and relied upon voluminous

materials forwarded by you to me, all of which have been identified and set forth in the Appendix attached hereto. In addition to reviewing the above materials, I have also conducted telephonic and in person interviews with your good self. Facts garnered from these personal interviews, conducted for purposes of background information and elucidation, have also been relied on by me in drafting this report and opinion.

STATEMENT OF FACTS

The defendant-counterclaimant, Boguslaw Oczkowski, was married on July 24, 1971, to Patricia Sileneck. On October 18, 1980, a child named Jason was born to this couple. In or about January, 1985, Boguslaw ("Bob") retained an attorney, Manny Gerstein, for the purpose of divorcing his wife and obtaining custody of his minor child. In March, 1985, Gerstein filed a complaint for

divorce in the Superior Court, Middlesex County, on grounds of extreme cruelty. The divorce case was tried before Judge Epstein on three days, September 24, November 18, and November 19, 1986. On January 6, 1987, the Court entered a final judgment of divorce. Bob was dissatisfied with the judgment, complaining to Gerstein about the harmful custody decision and improper equitable distribution. Since Gerstein refused to take any corrective action; and since he later withdrew from the case, Bob was obliged to obtain other counsel, one Martin W. Yazgier, Esq., of Matawan, New Jersey. Outside of filing a Notice of Appeal on February 20, 1987, Yazgier did nothing. Indeed, Yazgier failed to order the trial transcripts, failed to file a civil case statement, failed to apply for a stay of judgment pending appeal, and failed to prepare an

appropriate brief. Again, caught in a bind, Bob sought other counsel, this time retaining James P. Yudes, Esq. After portraying himself to Bob as the "top matrimonial lawyer in New Jersey", Yudes told Bob that his case had "been grossly mishandled" by his trial attorney (Gerstein) and his lawyer on appeal (Yazgier). Having reviewed the file, Yudes also related to Bob in great detail how the judgment improperly did him out of $40,000, and how Yudes could "easily get this back" for Bob. Yudes also promised Bob that he would have "this harmful custody arrangement modified". Yudes then informed Bob that should Bob decide to retain Yudes to perform the work promised by him, Bob must give him a $3,000 retainer. In accepting this retainer, Yudes specifically stated that "the total cost of the work to be done should be no more than

$5,000". Finally, in accepting the case, Yudes told Bob that, "I will personally handle your case from beginning to end". Despite this clear promise and representation, Yudes later introduced Bob on September 30, 1987, to his very junior associate, Charles "Chuck" Vuotto, Esq., telling Bob that "Chuck will be your lawyer". Following their introduction, Vuotto instructed Bob to sit down with him and go over all the files and records. This took some 4 hours, Vuotto charging Bob $400. During the entire month of October, 1987, Vuotto, Kevin Mazza, Esq., and Yudes allegedly performed work for Bob, charging him $6,939.50 for 64.9 hours of work. The work purportedly involved the preparation and filing of an appellate brief, "legal research", multiple meetings, and an incessant "review of files". This type of billing continued for a period of four

months, altogether totaling to date $17,518.40, of which the sum of $7,253.00 was paid by Bob. In November, 1987, while being represented by Yudes, Bob discovered that his ex-wife had levied on his checking account, and had obtained a Writ of Execution on his Spotswood home, where he resided with his six year old son. Although repeatedly warned by his adversary that such action would be taken against Bob, Yudes never told Bob about these warnings; nor did he take appropriate legal action to counter these levies and thereby prevent Bob and his son from losing their home and being thrown into the street. Finally, at the panic urgings and pleadings of Bob, Vuotto prepared and allegedly filed a motion before Judge Lerner to lift the levies. On December 3, 1987, Vuotto asked Bob to appear in court with him on the following day "just for ten minutes so you

can clarify the levy for the judge". On December 4, 1987, Bob appeared in the court room of Judge Lerner, where he was obliged to listen to various matters. From time to time, Vuotto and Stanton would go into chambers, Vuotto coming out to ask Bob questions pertaining to his assets and records. After spending the entire day in court, Bob realized that no motion was going to be heard, and that Vuotto had gotten him there under false pretenses. As Bob was about to leave the courthouse, Vuotto showed him a copy of an order, which appeared to have been signed by Judge Lerner. The order called for the payment of $801.34 to the Sheriff's office. At this time, Vuotto allegedly threatened Bob with warnings that he would lose his home and custody of his child unless he came up with an additional $105,000 "well in advance of the deadline of December 18,

1987". According to a December 31, 1987 billing statement, Vuotto charged Bob $900 for this "court time", and an additional $530 for preparation of the "unheard" and possibly non-existent motion. According to Bob Oczkowski, he has personally checked "every possible record", including those of the Superior Court and Appellate Division, but has found no trace of the order shown to him by Vuotto. As his relationship with the Yudes firm extended over the weeks and months, Bob became increasingly anxious and suspicious over the Yudes billing practices and the professional work that Yudes was allegedly performing on his behalf. For example, Vuotto engaged Bob in a series of "wild goose chases", summoning Bob repeatedly to his office some 30 miles distant from Bob's engineering office at Johnson & Johnson in Milltown. Invariably, when Bob would arrive, Vuotto would ask him to

"review the file", make notes or corrections on parts of the file, read certain documents which may have been altered, reviewing drafts of briefs (which were never filed), and drawing his own certifications. According to Bob, the Yudes firm would chalk up multiple hours of "professional work" for these pointless meetings, and charge all of them to Bob at rates between $100 and $225 per hour. While this "Yudes system", as described by Bob, garnered extensive unearned legal fees for the firm, it caused Bob untold harm in his personal, professional and family life. For example, Bob, who was a senior staff engineer in charge of major projects and staff, was constantly interrupted by Yudes and Vuotto with multiple "emergency" calls, to drive immediately to their office and review papers on one day, and to come back on the next day to sign them. Also, Vuotto

or Yudes would call Bob at his office to drop everything and come down immediately to their office for "emergency conferences". Invariably, when Bob would arrive at the Yudes office in Springfield, Vuotto or Yudes would hand him certain documents to "review", many of which had already been reviewed and re-reviewed on prior occasions. Sometimes, Vuotto and Yudes would yank bob out of work to write long statements about the factual background of the case, often requiring Bob to wait in the lobby for an hour or so before they would see him. Vuotto and Yudes would then require Bob to edit and rewrite these statements over and over again. According to Bob, Vuotto, in the presence of Bob, would engage in telephone conferences with his adversary, Stanton, and his former attorneys, Gerstein and Yazgier. After getting off the phone, Vuotto, while

shaking his head in despair, would put the conversation in the worst light possible, invariably telling Bob that he would be held in contempt, would go to jail, lose custody of his child, and lose his entire house. To reinfo this, Vuotto would engage in putative telephone conferences with the court, all in the presence of Bob, discussing the case in detail. Once off the phone, Vuotto would tell Bob that there are "serious problems here"; that "you're in trouble"; and that 'you've got to sell your house".

At times, Vuotto would insist that Bob bring to him multiple personal records, such as checks, bank statements, mortgages, savings accounts, medical records, work records, and the like. Once obtaining possession of these records, according to Bob, Vuotto would attach copies of certain selected documents to motions for various

types of relief. Bob later discovered. however, that these motions were never filed despite the representations of Vuotto. Moreover, Yudes and Vuotto have now refused to return Bob's personal papers to him, even though they do not constitute "work product"; and even though they remain fully aware that Bob required his own personal papers for his later appeals, and for use in his private life. On or about December 17, 1987, the day before Patricia would sell her interest in the family residence to Bob for $50,000, Vuotto asked Bob for an "additional four to five thousand in cash". Bob told Vuotto that his credit union would not give him cash; but would only issue certified checks. Vuotto then instructed Bob to obtain two checks, one for $801.34 payable to Stanton, and the other to the Money Store for $3,739.73. Based upon his own investigation, Bob now

claims that he never owed an $801.34 legal fee to Stanton, because Judge Lerner never signed the December 4, 1987 order. He further claims that Vuotto, in inducing him to pay the Stanton fee, showed him a "rubber stamped" version of the court's signature, but would not give him a copy. Bob apparently found out that no such order was ever entered when he checked the court files. Also, Bob contends that the $3,739.73 check was not due and owing to Patricia; that it should be returned to him; and that Yudes should get him an accounting of same.

Following the closing, Vuotto and Yudes began repeatedly to demand substantial amounts of money from Bob for their "additional fees", of which Bob had no forewarning or knowledge. They began flooding him with putative statements of professional services, which included false

balances, no supporting proofs, and willowy charges for such things as "attempt to contact client", "Yudes-Vuotto" conferences with each other, endless reviews of the file, and the like. On December 18, 1987, after Bob had given Yudes his last $2,000, Yudes and Vuotto began to demand "more security" for their fees, namely the surrender of the family home, or at least a substantial mortgage on the house. When Bob refused to accede to these demands, offering instead numerous alternatives, Yudes cut off their relationship. As a result of the wrongdoing of the Yudes firm and the extensive disruption of his employment, Bob was discharged by Johnson & Johnson from his engineer position of fifteen years, his latest position being staff engineer with a salary of over $50,000 per year, with extensive benefits. He also claims other losses directly

attributable to the misconduct of Yudes-Vuotto, including substantial damage to his health. Bob also claims that, as a result of the negligence of Yudes-Vuotto, he has become the victim of judgments totaling some $100,000 which were procured by fraud and deceit, and which have brought about the destruction of his formerly excellent credit. Moreover, Bob claims that his professional reputation has been destroyed, along with his business opportunities.

CONCLUSIONS OF LAW

The core issues arising out of the underlying facts in the instant counter-claim for legal malpractice are as follows:

1. Did Yudes commit legal malpractice when he charged Oczkowski for legal work he had never performed; when he submitted fraudulent billings to Oczkowski; when he drained the energy and time of Oczkowski, taking him

away from his employment for multiple hours, on false missions and wild goose chases; and when Yudes falsely rep-resented to Oczkowski that he would "personally handle your case from beginning to end"?

2. Was there a casual connection between the foregoing misconduct on the part of Yudes and the damages sustained by Oczkowski?

The matter of attorney negligence arising out of these issues must, of course, be evaluated and judged in accordance with the standard of care applicable in legal malpractice actions. In this regard, it is settled that an attorney is obligated to exercise on behalf of his client the knowledge, skill and ability ordinarily possessed and exercised by members of the legal pro-fession similarly situated, and to employ

reasonable care and prudence in connection therewith. McCullough v. Sullivan, 102 N.J.L. 381, 384 (E. & A. 1926); Sullivan v. Stoudt, 120 N.J.L. 304, 308 (E. & A. 1938); Taylor v. Shepard, 136 NJ Super. 85, 90 (App. Div. 1982); Saint Pius X House of Retreats v. Camden Diocese, 88 N.J. 571, 588, (1982). Perhaps the most quoted statement of the rule of care applicable to attorney to attorney negligence suits is found in Hodges v. Carter, 239 N.C. 517, 80 S.E. 2nd 144 (1954):

> "Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exercise his best judgment in the prosecution of the litigation entrusted to him and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of

> his knowledge to his client's cause". (Id. at 519, 80 S.E. 2nd at 145-146)

What constitutes a reasonable degree of care is not, of course, to be considered in a vacuum. On the contrary, it must be keyed into the facts and circumstances of each specific case, and the type of service the attorney undertakes therein. With this in mind, I now proceed to examine the conduct of the subject defendant attorney in connection with his professional conduct.

No words express with more meaning and eloquence the loyalty of an attorney to his client than those found at page 6 of Drinker's great disquisition on Legal Ethics under the caption, "The Lawyer's Cardinal Loyalties":

> "To his client he owes absolute candor, unanswerable fidelity, and undivided allegiance, furthering his cause with entire devotion, warm zeal, and his utmost ability and learning, but without using means other than those addressed to reason

> and under- standing: employing and countenancing no form of fraud, trickery, or deceit which, if brought to light, would shame his conscience or bring discredit to his profession".

Assuming the truth of the allegations related to me by Oczkowski, and only on that assumption, I am of the view that Yudes violated the duty of total fidelity, loyalty and good faith owed by all attorneys to their clients. For example, it was unprofessional and morally wrong for Yudes to dragoon Oczkowski from his employment and into the Yudes office; make him perform legal work that should have been done by the firm; charge Oczkowski $100.00- $225.00 per hour for his own work; and sock Oczkowski with further fees for such willowy and insubstantial items as "legal research", "review of files", "speak with office staff", inter-office conferences, an abundance amount of "attempts to contact client", and the like.

By utilizing the above shorthand labels and phrases; and by refusing to substantiate any of this alleged work, Yudes was able to intimidate Bob and compel him to pay fees over and above what was demanded in their original conference. Needless to say, Bob was at an incredible disadvantage in dealing with these fees, since he believed that his life and welfare depended solely upon Yudes and his firm. Pushed up against the wall, Bob had no choice other than to obtain various loans at very high financing costs in order to meet the incessant money demands of Yudes. Regrettably, having heard the history of this case from Bob, and having thoroughly reviewed all the supportive documents furnished me, I am of the opinion that the billing practices of Yudes, in so far as the same were applied to and imposed upon its former client, Bob Oczkowski, were unreasonable,

unconscionable, and constituted, in my view, an egregious form of overreaching severally deviating from the acceptable billing practices expected of New Jersey attorneys, and justifying, in my view, the imposition of punitive damages. (As for punitive damages, see, e.g. Blegan v. Superior Court, 125 Cal App 3d 959, 178 Cal Rptr 470 (1981); Rodriguez v. Horton, 95 NM 356, 622 P2d 261 (NM App 1980), where the defendant attorney's entire course of conduct in representing the plaintiff was characterized by fraud and deception, including deliberately misleading the client and charging excessive fees for services; and also see Kluge v. O'Gara, 227 Cal App 2d 207, 38 Cal Rptr 607 (1964). As for disciplinary proceedings in matters where overreaching is found, see DR 2-107 (D), stating that "A lawyer shall be disciplined if he shall enter into an

agreement for, charge or collect a fee so excessive as to evidence and intent to overreach his client"; and also see Annotation entitled "Attorney's Charging Excessive Fee As Ground For Disciplinary Action", 11 ALR4th, 133-207; also see In Re Giordano, 49 NJ 210 (1967), where the court accepted an attorneys resignation with prejudice, the statutory equivalent of disbarment, on a variety of grounds, among them the charging of an "exorbitant and unconscionable" fee: In Re Backes, 22 NJ 212 (1956); In Re Davies, 39 NJ 242 (1963); In Re Reisdorf, 80 NJ 319 (1979); In Re Hahn, 84 NJ Eq. (1915).

Assuming the truth of the history recounted to me, it is obvious that Yudes, having taken the measure of Bob, and having determined him to be a man frantic and desperate over his child, home and work, took gross and unfair advantage of him. So

it is that Yudes would interrupt Bob at Johnson & Johnson on multiple occasions, requiring him to leave his job and go on wild goose chases that had no importance whatsoever except, of course. for billing purposes. Indeed, Yudes had no business disturbing Bob at Johnson & Johnson, his only source of income. The bills from the Yudes firm will indicate that Yudes contacted him at least 54 times in the short span of only four months. In that short period of time, Bob lost 10 days from work and expended over 200 hours doing work at the Yudes firm which had been demanded of him. Because of his many hours lost from work; because Yudes interrupted Bob in various special projects; and because Yudes persistently hunted Bob down throughout the Johnson & Johnson plant, Bob eventually lost his $50,000 a year senior engineering job which he had held for over 15 years.

Given this set of lamentable conditions created by Yudes, and his willful and knowing intention to create such sorrowful conditions, I am obliged to find that Yudes deviated from the acceptable standard of care expected of all New Jersey matrimonial attorneys. And I am of the further opinion that the above misconduct and unprofessionalism on the part of Yudes was directly related to the loss of employment, and was the direct causation or proximate cause of such loss.

The record shows that Bob hired Yudes solely for the purpose of continuing the appeal of his January 6, 1987 Divorce Judgment which had been started by Yazgier. On September 29. 1987, Yudes took a $5,000.00 retainer from Bob. At this point. Yudes was required, inter alia, to obtain the trial records, including all pleadings, discovery. transcripts, trial exhibits and

the like; to analyze them and single out the major issues of appeal; and to draft a proper appendix and brief for filing with the Appellate Division. Astonishingly, Yudes fulfilled none of these major duties. Instead, as noted above, Yudes repeatedly insisted that Bob come to his office and draft memoranda; to review "drafts of briefs" and comment on them; and to write long and very detailed discourses on attorneys Yazgier, Gerstein, and Stanton, pinpointing all their acts of unethical conduct. After the Appellate Division granted Yudes a final extension to file his brief on or before February 22, 1988, Yudes made more money demands on Bob. This time Yudes upbraided and threatened Bob that he would file no brief until Bob signed over his home to Yudes in payment for his work on the brief and filing the same with the Appellate Division. Even though Bob begged

Yudes not to remove the roof over his son and himself, and promised to make other forms of payment, Yudes spurned the pleas of Bob, arbitrarily withdrawing from the case on or about February 9, 1988, and returning "very limited files" on February 11, 1988, only 11 days from the final date to file the brief in the Appellate Division. Unable to obtain all his files and records from Yudes, Bob was obliged to do the best he could as a layman, hastily drafting his brief in an incomplete and disorganized manner. Even so, the Appellate Division remanded the matter to the trial court, which later affirmed its original decision.

Initially, I advert to the crisis confronting Bob when Yudes, demanding his home, arbitrarily withdrew from the case. The wrongdoing of Yudes may be compared to the crisis faced by the plaintiff in

Kriegsman v. Kriegsman, 150 N.J. Super. 474 (App. Div. 1977) when her attorneys moved to be relieved as counsel on her behalf before trial of a matrimonial matter. It appears, as here, that the attorneys for plaintiff had undertaken to represent her on a $2,000.00 retainer less cost. Because plaintiff was financially unable immediately to pay additional fees of some $5,000.00 her attorneys moved to abandon plaintiff in the middle of her lawsuit. In refusing to allow these attorneys to abandon the plaintiff and leave her high and dry after they had grabbed her money, the Court opined as follows:

> "When a firm accepts a retainer to conduct a legal proceeding, it impliedly agrees to prosecute the matter to a conclusion. The firm is not at liberty to abandon the case without justifiable or reasonable cause, or the onset of its client 7 A M Jur. 2d Attorneys at law. Section 143 at 134 (1963); 7 C.J.S., Attorney and Client, Section 110 at 943-945 (1937). We are firmly

convinced that the Rose firm did not have cause to abandon plaintiff's case, and that the trial judge properly exercised his discretion when he denied the firm's application and scheduled an early trial date. See R 1:11-2; Jacobs v.Pendel, supra, 98 N.J. super. at 255. It was to plaintiff's and the firm's advantage that the matter be heard and disposed of as expeditiously as possible. With trial imminent, it would be extremely difficult for plaintiff to obtain other representation, and therefore she clearly would be prejudiced the Rose firm's withdrawal. See D. R. 2-110 (A) (2); Finch v. Wallberg Dredging Co., 76 Idaho 246, 281 P.2d 136, 138 Sup. Ct. (1955); Bergman v. Hedges, 111, I11 App. 2d 35, 249 N.E. 2d 666, 668 App. Ct. (1969); Fessler v. Weiss, 348 I11. app. 21, 107 N.E. 2d 795, 798 (App. Ct. 1952); Carter v. Carter, 188 Misc. 156, 66 N.Y.S. 2d. 768 770 (City Ct. 1946); Phoenix Mut. Life Ins. Co. v. Radcliffe on the Del., Inc., 439 Pa. 159, 266 A. 2d 698, 700 (Sup. Ct. 1970); Cotrone v. Bryan Production Credit Ass'n, 502 S.W. 2d 954, 956 (Tex.Civ.App. 1973), writ of error refused, no reversible error.

"Since the Rose firm undertook to present plaintiff and demanded and was paid a retainer of $2,000,00 they should continue to represent plaintiff through the completion of the trial.The firm should not be relieved at this stage of the litigation merely because plaintiff is unable to

> pay them all of the fees they have demanded. See Drinker, Legal Ethics, 140, n. 4(1953). We are not unmindful of the fact that the Rose firm has performed substantial legal services for plaintiff and clearly is entitled to reasonable compensation therefore. Nevertheless, an attorney has certain obligations and duties to a client once representation is undertaken. These obligations do not evaporate because the case becomes more complicated or the work more arduous or the retainer not as profitable as the first contemplated or imagined. Cf. Suffold Roadways, Inc., v. Minsue, 56 Misc. 2d 6, 287, N.Y.S. 2d 965, 969-970 (Sup. Ct. 1968). Attorneys must never lose light of the fact that "the profession is a branch of the administration of justice and not a mere money-getting trade". Canon of Professional Ethics, No. 12. As Canon 44 of the Canons of Professional Ethics so appropriately states: The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor of self-respect". Adherence to these strictures in no way violates the constitutional rights of the members of the firm. State v. Rush, 46 N.J. 399, 407-409 (1966).

Here, Yudes clearly lost sight of the fact that our profession is a branch of the administration of justice, and not a mere money-getting trade. Our Rules

of Ethics, derived as they are from concepts of ordinary decency, morality and compassion, forbid lawyers to throw up an unfinished task to the detriment of their clients except for reasons of honor or self- respect. Thus. in my view, Yudes had no more right to abandon Bob in his legal crisis than could a rapacious surgeon, overwhelmed by an unslakeable thirst for money, ethically abandoned his patient in the middle of an operation upon discovering that he was not covered by Blue Cross/Blue Shield. In abandoning the besieged Bob unless he gave up his house, Yudes fell below the acceptable standard of conduct expected of all New Jersey matrimonial lawyers and is liable, in this regard, to plaintiff for legal malpractice and ensuing damages.

As serious as the above matters appear to be, the record shows even more serious conduct on the part of Yudes. In this regard. I refer to the false representations made by Yudes to Bob when the former claimed that he had written and filed documents on behalf of Bob, which were in fact never written or filed. For example, the so-called brief for which Bob was charged 65 hours was in fact never completed and never filed. Again, motions claimed by Yudes to have been prepared and filed, were never in fact filed or heard by the court. Additionally, Court orders were claimed by Yudes to have been signed by a Judge were never in fact signed, Bob paying Yudes money "as ordered by the Court" on these fictitious orders. Moreover, we find that Yudes failed to give Bob an accounting of some $54,000.00 in checks which were ear-marked for his ex-

wife as part of her equitable distribution.

Assuming the truth of these statements, and assuming their admissibility at trial, it is my view that the defendants Yudes practiced fraud and deceit upon Bob, for which he is entitled to have both compensatory and punitive damages.

CONCLUSION

For all the foregoing reasons, it is my view that the defendants committed legal malpractice and practiced fraud upon the plaintiff. Bob Oczkowski, warranting an award to plaintiff for both compensatory and punitive damages.

/s/MILTON DIAMOND